Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CG Docket No. 02-278
Rules and Regulations Implementing the	)	CG Docket No. 18-152
Telephone Consumer Protection Act of 1991	)	

REPLY COMMENTS OF VIBES MEDIA, LLC

Cheryl Sanders
VIBES MEDIA, LLC
300 West Adams Street, 7th Floor
Chicago, IL 60606
(312) 753-6330

Jennifer P. Bagg
E. Austin Bonner
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 730-1300
jbagg@hwglaw.com

Counsel for Vibes Media, LLC

June 28, 2018

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 2

II. ARGUMENT 4

A. Commenters overwhelmingly agree that the FCC should adopt a clear, precise definition of an autodialer that is consistent with congressional intent. 4

B. The Commission should not punish good-faith attempts to avoid calling reassigned numbers. 7

C. The Commission should clarify which revocation methods are "reasonable" in the texting context. 9

III. CONCLUSION 11

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CG Docket No. 02-278
Rules and Regulations Implementing the	)	CG Docket No. 18-152
Telephone Consumer Protection Act of 1991	)	

REPLY COMMENTS OF VIBES MEDIA, LLC

Since the enactment of the Telephone Consumer Protection Act ("TCPA") over twenty-five years ago, the Federal Communications Commission ("FCC" or "Commission") has built up a body of decisions implementing the TCPA that are often confusing and conflict with both prior FCC TCPA-related decisions and the text of the statute. The D.C. Circuit's decision in *ACA International v. FCC* began to clear away some of that confusion and has provided a path for the FCC to rationalize its TCPA framework.[1] Vibes Media, LLC ("Vibes") supports the Commission's efforts to further revisit its TCPA regulations in light of the D.C. Circuit's decision.[2] Vibes hereby submits these reply comments to add its voice to the majority of commenters that have asked the Commission to (A) adopt a definition of automatic telephone dialing systems (commonly known as "autodialers" or "ATDS") that is consistent with the statute, (B) shield from liability callers who follow the best available methods to avoid calling reassigned numbers, and (C) confirm that companies who send text messages can rely on widely accepted, industry-standard methods for revocation without fear of liability.

---

1 *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

2 *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, Public Notice, DA 18-493, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018).

I. INTRODUCTION AND SUMMARY

Vibes is a mobile marketing technology leader that helps some of the world's biggest brands acquire, engage, and deepen relationships with an interested and engaged consumer base. Vibes' mobile solutions include mapping out a mobile strategy, building permission-based mobile databases, driving sales with mobile coupons, activating sponsorships, and integrating with companies to forge immediate, long-lasting, and mutually beneficial customer relationships.

Vibes supports and contributes to the development of industry best practices that ensure brand communications go to customers who want to receive them. For example, Vibes follows the industry guidelines set out in the CTIA Short Code Monitoring Handbook,[3]and actively participates in related CTIA working groups. The CTIA industry guidelines set out a framework for short-code-based texting programs. The guidelines focus on providing quality user experience, honoring consumer choice, and preventing abusive practices. Vibes and virtually all legitimate short-code text messaging providers follow these guidelines and, as such, display clear calls-to-action, offer clear opt-in and opt-out mechanisms, and confirm opt-ins and opt-outs.[4]

Vibes has participated in the Commission's development of TCPA regulations, advocating for clear, unambiguous rules that are consistent with Congress's intent. Vibes supported the petition of the Retail Industry Leaders Association that asked the Commission to clarify the TCPA's application to on demand text offers.[5] Vibes also joined a coalition of mobile

---

[3] CTIA, CTIA Short Code Monitoring Program, Short Code Monitoring Handbook (V1.7 2017), https://2yvxip346v4g11b8zt1rvr1m-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/CTIA-Short-Code-Monitoring-Handbook-v1-7-03-27-17.pdf, ("CTIA Handbook").

[4] *See* CTIA Handbook at 3.

[5] Vibes Media Comments in Support of RILA Petition for Declaratory Ruling at 2-3, CG Docket No. 02-278 (filed Feb. 21, 2014).

engagement providers in arguing that new prior express written consent requirements adopted in 2012 should not apply to existing consents, and Vibes argued that (1) the one-call limit for calls to reassigned numbers was unworkable in the text context and (2) reasonable revocation rules must recognize that texting systems must be pre-programmed.[6] Because the FCC's 2015 Omnibus TCPA Order (the "2015 Order")[7] ultimately created new confusion, rather than clarification, Vibes joined the large, diverse group of callers who petitioned the D.C. Circuit for review of the 2015 Order's conclusions on the autodialer definition, reassigned numbers, and opt-out mechanisms. Since then, Vibes has also weighed in on the Commission's efforts to develop a reassigned number database.[8]

Vibes submits these reply comments as part of its continued effort to bring TCPA regulations back in line with congressional intent and the plain language of the statute, with the ultimate goal of providing certainty within the mobile marketing ecosystem. First, Vibes and the vast majority of commenters agree that the Commission should adopt a clear, precise standard for what constitutes an autodialer that is consistent with the statute. For too long, callers have been unable to know definitively whether a device that cannot generate random or sequential numbers is nonetheless an autodialer, which has, in turn, led to unnecessary and protracted litigation. The Commission should correct that problem by confirming, once and for all, that number generation is a necessary predicate to meeting the statutory definition of ATDS. Second,

---

6 Letter from Jennifer P. Bagg, Counsel to Vibes Media, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 02-278 (filed June 11, 2015); *see also* Letter from Monica S. Desai, Counsel to a Coalition of Mobile Engagement Providers, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. CG 02-278, (filed Dec. 16, 2013).

7 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015) ("2015 Order").

8 *See supra* at 7.

the FCC should ensure that callers who follow the best available methods to avoid calling reassigned numbers are not subject to liability. Though the Commission has recognized that no perfect method exists, it must clarify the application of the TCPA to callers that reach reassigned numbers in order to help diminish the crippling litigation risks that companies that are working hard to avoid calling reassigned numbers face. That unfair result chills legitimate, requested communications, and creates even more unwarranted litigation. Finally, the FCC should confirm that companies who send text messages can continue to use widely accepted, industry-standard revocation mechanisms, and that called parties must utilize such mechanisms to indicate their desire to revoke consent.

II. ARGUMENT

A. Commenters overwhelmingly agree that the FCC should adopt a clear, precise definition of an autodialer that is consistent with congressional intent.

Companies like Vibes need to be able to properly advise their customers whether a particular dialing technology is or is not an ATDS, so that they can implement appropriate compliance systems. Today, that is impossible. Therefore, Vibes urges the Commission to clarify the definition of an autodialer.[9]

As the D.C. Circuit recognized, the 2015 Order and the FCC's previous TCPA decisions created confusion about whether many commonly used calling technologies qualify as ATDS under the TCPA.[10] That confusion has led to inconsistent judicial decisions that create

---

[9] *See, e.g.*, Comments of ADT LLC d/b/a/ ADT Security Services at 9 ("ADT Comments"); Comments of the Bureau of Consumer Financial Protection at 2; Comments of the Retail Industry Leaders Association at 12-13; Comments of RingCentral, Inc. at 2; Comments of Tatango, Inc. In Response to the Consumer and Governmental Affairs Bureau's Public Notice at 4. Unless otherwise noted, all comment citations herein are to comments filed on June 13, 2018 in CG Docket Nos. 18-152, 02-278.

[10] 2015 Order, 30 FCC Rcd. at 7971.

compliance challenges and an unfair application of the law in different parts of the country. For example, shortly after *ACA International* was decided, a federal district court in Arizona held that a device that could only call numbers from a preprogrammed file or list provided by the user, as opposed to randomly or sequentially generating those numbers itself, was not an autodialer.[11] There, the court reasoned that, despite previous pre-*ACA International* FCC pronouncements on dialing from a list, it could not read the number generation requirement out of the statute. But, on the same day, a magistrate judge in the Southern District of Florida declined to enforce the number generation requirement, finding that the FCC's old conclusions on the subject remained binding authority.[12] Those two decisions cannot be reconciled.

However, *ACA International* has established a clear path forward for the FCC. As the May 2018 petition for declaratory ruling filed by the U.S Chamber of Commerce and other parties explains, the FCC should confirm that equipment must generate random or sequential numbers in order to be an autodialer.[13] Most commenters agree that the plain language of the statute requires the "use" of a "random or sequential number generator" and that "use" must include *generating* random or sequential numbers.[14] Otherwise, what meaning could be given to the word "generator"? But failing to give meaning to the word "generator", as a few

---

[11] *See Herrick v. GoDaddy.com LLC*, No. CV-16-00254-PHX-DJH, 2018 WL 2229131, at *1 (D. Ariz. May 14, 2018).

[12] *See Reyes v. BCA Financial Services, Inc.*, No. 16-24077-CIV-GOODMAN, 2018 WL 2220417, at *2 (S.D. Fla. May 14, 2018).

[13] Petition for Declaratory Ruling of the U.S. Chamber of Commerce, et al. at 21, CG Docket No. 02-278 (filed May 3, 2018).

[14] *See, e.g.*, Comments of ACT | The App Association at 4 ("ACT Comments"),(filed June 15, 2018); Comments of the Consumer Bankers Association at 3 ("CBA Comments"); Comments of U.S. Chamber Institute for Legal Reform at 12 ("U.S. Chamber Comments").

commenters request,[15] impermissibly reads out part of the statute. The FCC's statutory interpretation requirement here is clear: "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[16] Because the TCPA is unambiguous on this point, the Commission has no authority to adopt an autodialer definition that reads out the word "generate."[17] The TCPA's legislative history, which focused on instructive practices like cold-call telemarketing and spam faxes, supports this position, because these practices stemmed from the use of random or sequential number generation.[18] But a conclusion that dialing from a pre-loaded list meets the statutory definition of an autodialer would do just that. Vibes agrees that previous Commissions have "warped the TCPA's original focus on abusive practices and created a regime that encourages crippling lawsuits against legitimate businesses acting in good faith."[19] The Commission should grant the U.S. Chamber Petition and take immediate action to bring its rules back in line with the statute.

The Commission can confirm the statutory definition of an autodialer as described herein with the confidence that doing so will not lead to a flood of unwanted messages. A few commenters have asked the FCC to expand the congressional definition of an autodialer to limit communications even from legitimate callers in order to "[e]nd [r]obocalls."[20] Those fears are unfounded. Vibes and other short-code users already follow CTIA and carrier-specific

---

15 *See, e.g.*, Comments of Consumer Action at 2 (filed June 11, 2018).

16 *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quotation omitted).

17 *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

18 *See* U.S. Chamber Comments at 3.

19 U.S. Chamber Comments at 3.

20 *See* Comments of Consumers Union at 2.

guidelines that require rigorous attention to securing and confirming consumer consent.[21] On this point, the CTIA guidelines could not be more clear: unsolicited messages — messages without prior express consent or after an opt-out request has been processed — cannot be sent. CTIA also operates an audit program that monitors programs in market and flags any that are not compliant. There is a timeframe established for fixing the program and resolving the audit. Indeed, Vibes is contractually obligated to follow the CTIA guidelines and presumably other callers that enter into commercial arrangements with carriers to utilize short codes on those carriers' networks are also required to adhere to the guidelines. These industry rules go beyond the TCPA's requirements and will continue to be followed after the FCC clarifies its rules. The reason is simple: Vibes and other short-code users have no reason to waste resources sending messages to consumers who are not interested.

B. The Commission should not punish good-faith attempts to avoid calling reassigned numbers.

Reassigned numbers remain a common compliance challenge for callers and an annoyance to customers who receive calls meant for someone else. But, as the Commission has recognized, there is currently no guaranteed way for even the most diligent callers to avoid dialing a number that has been reassigned.[22] As Vibes explained in its comments on the proposed reassigned number database,[23] in the absence of a comprehensive, mandated solution in

---

21 CTIA Handbook at 3-4.

22 *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, FCC 18-31, CG Docket No. 17-59, ¶ 5 (rel. Mar. 23, 2018).

23 Comments of Vibes Media, LLC at 2, CG Docket No. 17-59 (filed June 7, 2018).

place to help callers identify and remove reassigned numbers, the industry has developed a fairly successful workaround that many responsible industry actors, including Vibes, use.

Those industry efforts have created a solid base that the Commission should build on. Rather than waiting for a new system to be implemented, the Commission should issue rules now that target relatively minor modifications to this industry-designed workaround. These modifications can be in lieu of creating the proposed reassigned number database, or in advance of adopting final rules that create such a database.

Moreover, the Commission need not wait for a perfect technical solution before it corrects the statutory interpretation that has escalated the problem of reassigned numbers into a flood of nuisance lawsuits. As numerous commenters have explained, the Commission should also clarify that "called party" means "intended recipient" or the person the caller reasonably expected to contact.[24] That reading of the statute best comports with Congress's focus on the

[24] *See, e.g.*, ACT Comments at 4; ADT Comments at 17; Comments of the American Financial Services Association at 9; Comments of The Association of Credit and Collection Professionals at 4; Comments of The American Association of Healthcare Administrative Management at 4-5 (filed June 12, 2018); Bellco Credit Union Comments at 2 (filed June 12, 2018); Comments of Blackboard Inc. at 3; CBA Comments at 4; Comments of the Coalition of Higher Education Assistance Organizations in response to "Interpretation Of The Telephone Consumer Protection Act In Light Of The D.C. Circuit's ACA International Decision" at 4; Comments of the Credit Union National Association at 5-6 ("CUNA Comments"); Comments of CTIA ("CTIA Comments") at 2; Comments of Edison Electric Institute and National Rural Electric Cooperative Association at 8; comments of Electronic Transactions Association at 6; Comments of Heartland Credit Union Association at 1; Comments of INCOMPAS at 5; Comments of The Insurance Coalition at 2; Comments of the National Association of Chain Drug Stores at 2 (filed June 12, 2018); Comments of the National Automobile Dealers Association at 9; Comments of NCTA – The Internet & Television Association at 7; Comments of Noble Systems Corporation at ii; Comments of PRA Group, Inc. at 2, 9; Comment of Professional Association for Customer Engagement at 2, 11; Comments of Quicken Loans at 3; Comments of the Retail Energy Supply Association Comments at 15; Comments of the Retail Industry Leaders Association at 16; Comments of the Student Loan Servicing Alliance Navient Corp.; Nelnet Servicing, LLC; and

consent of the called party and with the Commission's conclusion "that a caller may reasonably rely on the prior consent of the party."[25] Unless and until that clarification is in place, Vibes agrees that organizations that apply reasonable industry standards to avoid calling reassigned numbers should be specifically shielded from liability by the FCC's rules.[26] If the FCC decides to mandate the use of a centralized reassigned number database, using that database should also create a safe harbor. As then-Commissioner Pai's dissent from the 2015 Order explained, "trial lawyers have sought to apply a strict liability standard on good-faith actors."[27] Without specific direction from the Commission, some courts may adopt the strict liability approach.

C. The Commission should clarify which revocation methods are "reasonable" in the texting context.

Vibes supports and implements methods that make it easy for consumers to opt out of text messages they no longer want to receive. Text messaging systems like the ones Vibes has deployed give consumers simple, easy-to-use controls over which communications they receive from the very first text message they receive. When a consumer receives a text, the consumer can simply reply STOP or CANCEL; there is no need to look up a telephone number or drive to a retail store in order to communicate with the sender. Consistent with the CTIA and carrier guidelines, Vibes provides instructions about opting out at the time a consumer opts in and regularly thereafter. For example, a customer who has been receiving weekly coupon offers from a retailer would receive opt-out instructions upon signing up and again periodically as long

---

Pennsylvania Higher Education Assistance Agency at 23-24; Comments of Suncoast Credit Union at 1-2 (filed June 14, 2018); Comments of UnitedHealth Group at 2.

[25] CUNA Comments at 6.

[26] *See* U.S. Chamber Comments at 15.

[27] 2015 Order, 30 FCC Rcd. at 8077-8078.

as the campaign continues. These easy and frequently communicated automated revocations are, of course, reasonable methods covered by the 2015 Order.

These straightforward communications depend on automated systems that must be programmed to recognize opt-out commands. The texting industry has worked together to create and communicate standardized opt-out commands, including STOP, STOPALL, QUIT, END, UNSUBSCRIBE, and CANCEL. The Commission's 2015 Order, however, left open the possibility that there might be other reasonable revocation methods. Even so, most consumers have continued to use the widely recognized opt-out commands. But a few individuals and class action lawyers have attempted to exploit the 2015 Order's ambiguity by stretching the definition of reasonable. As a result, confusion about what constitutes a "reasonable" revocation attempt is already creating wasteful and exploitive litigation. For example, in *Epps v. Earth Fare Inc.*, No. 16-8221, 2017 WL 1424637 (C.D. Cal. Feb. 27, 2017), appeal docketed, No. 17-55413 (9th Cir. March 28, 2017), the plaintiff ignored instructions to send a STOP request and instead sent long sentences that an automated system cannot recognize, including "I would appreciate if we discontinue any further texts." The parties have been litigating the resulting TCPA claims for nearly two years, at great cost.

The Commission can resolve this confusion with a few modest clarifications that are consistent with *ACA International*. First, the Commission should confirm that callers and called parties may, by agreement, specify the revocation methods that should be used for particular communications.[28] In the texting context, this is easily done: information about opting out can

[28] *See, e.g.*, CTIA Comments at 11; *see also ACA Int'l*, 885 F.3d at 710 (noting that the 2015 Order does not address whether parties can mutually agree to a revocation method).

be provided as part of the opt-in process, and throughout the message flow.[29] The Commission should also identify standardized revocation methods (for example, texting STOP) that are presumptively reasonable, such as the STOP and CANCEL codes.[30] Finally, the Commission should confirm that attempts to evade standardized revocation methods are not "reasonable." When a text message sender has established standardized opt-out codes and asked called parties to agree to them during the opt-in process, using another method like the long messages in *Earth Fare* is not reasonable.

III. CONCLUSION

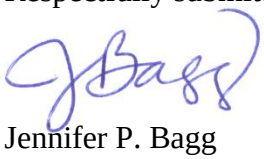
For too long, the FCC's TCPA rules have created confusion rather than real consumer protection. By vacating earlier, failed attempts to implement the statute, *ACA International* has cleared the way for a more consistent, rational understanding of the TCPA. The Commission should immediately (1) clarify that autodialers must generate random or sequential numbers, (2) shield from liability callers who reasonably attempt to handle reassigned numbers, and (3) clarify which revocation methods are "reasonable" in the texting context. Making these changes will ensure that the FCC's rules continue to prohibit abusive practices, but without chilling legitimate business communications or exposing companies attempting to comply in good-faith to potentially ruinous frivolous litigation. That balance is achievable, and the Commission should act now.

---

[29] *See* CTIA Handbook at 8 (describing when opt-out instructions must be provided).

[30] *See* U.S. Chamber Comments at 21-22.

Respectfully submitted,



Jennifer P. Bagg
E. Austin Bonner
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 730-1300
jbagg@hwglaw.com

Counsel for Vibes Media, LLC

Cheryl Sanders
VIBES MEDIA, LLC
300 West Adams Street, 7th Floor
Chicago, IL 60606
(312) 753-6330

June 28, 2018